UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ECHO & RIG SACRAMENTO, LLC, individually and on behalf of all others similarly situated, Plaintiff, v. AMGUARD INSURANCE COMPANY, Defendant.	No. 2:23-cv-00197-DJC-JDP ORDER

The present case concerns the fairness of an insurance company collecting pre-COVID-19 premium rates from restaurants and other businesses during the COVID-19 pandemic, despite the businesses being closed or operating at a limited capacity for much of 2020. Plaintiff Echo & Rig, a restaurant in Sacramento, California, brings claims on behalf of itself and others similarly situated alleging that Defendant AmGuard Insurance Company was unjustly enriched by retaining a rate of return that was excessive compared to the businesses' reduced risk exposure, and that Defendant's failure to refund or reassess the businesses' insurance rates was an unfair business practice in violation of the California Unfair Competition Law ("UCL").

Defendant has moved to dismiss Plaintiff's claims arguing that Defendant's conduct was protected by the UCL "safe harbor," and that Plaintiff has failed to state a

claim for unjust enrichment. Defendant also requests the Court to, in the alternative, dismiss Plaintiff's claims under the primary jurisdiction doctrine.

For the following reasons the Court will GRANT in part and DENY in part Defendant's Motion.

I. Background

Plaintiff Echo & Rig is a restaurant in Sacramento, California bringing claims on behalf of itself and others similarly situated. (First Am. Compl. ("FAC") (ECF No. 21) ¶¶ 4, 10.) During the COVID-19 pandemic Plaintiff was forced to close its business from mid-March 2020 through August 2020. (*Id.* ¶¶ 4, 20–23.) It reopened in September of 2020 in a limited capacity not exceeding 20% of its pre-COVID operations. (*Id.*)

During this time, Plaintiff maintained an insurance policy with Defendant AmGuard Insurance Company. (*Id.* ¶ 12.) The policy started on November 12, 2019 and ran through November 12, 2020. (*Id.*) Despite Plaintiff's business being fully closed or operating at a limited capacity for most of the policy period, Plaintiff continued to pay an insurance premium that was based on Plaintiff's normal operating capacity for the full policy period. (*Id.* ¶¶ 28–31, 46.)

While the COVID-19 pandemic was ongoing, the California Insurance Commissioner issued three bulletins notifying property and casualty insurers that the pandemic related closure of many businesses had caused the projected loss exposure of these business to be overstated or misclassified. (*Id.* ¶ 37–43.) Through the bulletins, the Insurance Commissioner requested that insurers issue premium refunds to their insureds by either applying a uniform premium reduction or adjustment, or by conducting a case-by-case assessment of their insureds' exposure bases. (*Id.*) The bulletins also required insurance companies to report to the Commissioner regarding the actions they took. (*Id.* ¶ 40.) The bulletins applied to the months of March through June and "any months subsequent to June if the COVID-19 pandemic

continues to result in projected loss exposures remaining overstated or misclassified." (*Id.* ¶ 41.)

In response to these bulletins, Defendant reported to the California Department of Insurance that it "provided refunds of between 15% and 30% to policyholders for [the period between March 15 through May 31, 2020], depending on the line of business and classification, with some exceptions." (*Id.* ¶ 47; ECF No. 21-7 at 3.) Defendant also stated that for the months subsequent to June 2020, it undertook a case-by-case reassessment of its insureds' exposure bases based on information provided by policyholders and at the policyholders' requests and issued premium reductions as it saw fit. (FAC ¶ 9; ECF No. 21-7 at 3.)

Plaintiff alleges that it was not issued a refund in the first round of refunds provided by Defendant, nor was Plaintiff notified of Defendant's plan to reassess premiums or given an opportunity to provide Defendant with information about its reduced operations and request a reduction. (*Id.* ¶ 48–49.) Plaintiff further alleges that even if it was given the 15% to 30% refund, such a refund would not have adequately compensated Plaintiff for the excess premium it paid. (*Id.* ¶ 48.)

Plaintiff brought the present action alleging that Defendant's collection and retention of excessive premiums as a result of Plaintiff's exposure being overstated during the COVID-19 pandemic violates public policy as established in Proposition 103 "to protect consumers from arbitrary insurance rates and practices" and "to ensure that insurance is fair, available, and affordable for all Californians." (*Id.* ¶ 34.) Plaintiff claims that Defendant's conduct was an unfair business practice in violation of the UCL, Business and Professions Code section 17200, *et seq.*, and that Defendant was unjustly enriched. (*Id.* at 14–16.)

Defendant brought the present Motion to Dismiss Plaintiff's FAC and Plaintiff has opposed the motion. (Mot. (ECF No. 23-1); Opp'n (ECF No. 29).)

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II. Legal Standard for Motion to Dismiss

A party may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The motion may be granted if the complaint lacks a "cognizable legal theory" or if its factual allegations do not support a cognizable legal theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). The Court assumes all factual allegations are true and construes "them in the light most favorable to the nonmoving party." *Steinle v. City and Cnty. of San Francisco*, 919 F.3d 1154, 1160 (9th Cir. 2019) (quoting *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)). If the complaint's allegations do not "plausibly give rise to an entitlement to relief," the motion must be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than unadorned accusations; "sufficient factual matter" must make the claim at least plausible. *Iqbal*, 556 U.S. at 678. In the same vein, conclusory or formulaic recitations of elements do not alone suffice. *Id.* (citing *Twombly*, 550 U.S. at 555). This evaluation of plausibility is a context-specific task drawing on "judicial experience and common sense." *Id.* at 679.

III. Discussion

A. Unfair Competition Law

Plaintiff claims that Defendant engaged in an unfair business practice prohibited by the UCL by retaining the allegedly excessive premiums paid by Plaintiff during the pandemic, and by failing to reassess Plaintiff's rate. "The unfair prong of the UCL 'creates a cause of action for a business practice that is unfair even if not proscribed by some other law.'" *Day v. GEICO Cas. Co.*, 580 F. Supp. 3d 830, 844 (N.D. Cal. 2022) (quoting *Cappello v. Walmart Inc.*, 394 F. Supp. 3d 1015, 1023 (N.D. Cal. 2019)). Whether conduct is unfair can be determined two ways: (1) by

establishing that the conduct offends "some legislatively declared policy" (the "tethering" test) or (2) by weighing the utility of the conduct against the harm to the alleged victim (the "balancing" test). *Id.* at 844–45 (citing *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007) and *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012)). The California Supreme Court rejected the balancing test in favor of the tethering test in the context of competitor suits under the UCL in *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999), but has failed to clarify whether this also applies to consumer suits. *See Nationwide Biweekly Admin., Inc. v. Superior Ct. of Alameda Cnty.*, 9 Cal. 5th 279, 304 (2020) (acknowledging split in appellate courts but declining to address whether the tethering test also applies to consumer suits). In the absence of such guidance, the Ninth Circuit has endorsed the balancing test, but has in practice preferred review under both tests. *See Lozano*, 504 F.3d at 735 (stating that the two tests are not mutually exclusive); *Davis*, 691 at 1170 (finding that plaintiff failed to state a claim under either prong); *see also Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1215 (9th Cir. 2020) (applying both tests to plaintiff's UCL claims).

Plaintiff alleges that the Defendant acted unfairly by violating the public policy established under Proposition 103 to limit insurance premiums and rates to a fair rate of return on the risk covered by the policy, and California Insurance Code section 1861.01(a), which states that "[n]o rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." (FAC ¶ 33.) The rate Plaintiff was charged was based on the risks of Plaintiff's pre-pandemic operations. Because its business was closed or operating with limited capacity for a large portion of the policy period due to the pandemic, and therefore had lower operating risks than initially contemplated by the parties, Plaintiff alleges the premium was based on overstated risks. Plaintiff further alleges that although Defendant provided premium refunds to some insureds, Plaintiff did not receive a refund or an explanation as to why it did not receive a refund. In addition, in

its response to the Insurance Commissioner's bulletins, Defendant stated it would undertake a "case-by-case reassessment of exposure bases" but Plaintiff alleges that Defendant failed to "provide any notification, explanation, or opportunity to provide information regarding Plaintiff's reduced operations and entitlement to a refund and reduced premiums." (*Id.* ¶ 49.)

As an initial matter, Plaintiff claims to a refund based on the Insurance Commissioner's Bulletins that ordered retroactive relief, or based on Insurance Code section 1861.01(a), are foreclosed by current California law. In *State Farm General Insurance Co. v. Lara*, 71 Cal. App. 5th 148, 188–91 (2021) the California Court of Appeals found that the Insurance Commissioner did not have the authority to order insurance companies to issue retroactive refunds because section 1861 does not operate retroactively, and the Commissioner's authority to alter rates is therefore only prospective.[1] However, this decision does not preclude Plaintiff from seeking damages for Defendant's allegedly unfair practice of failing to prospectively modify the premium rate.

Defendant argues that charging the rate under the policy cannot be considered unfair under the UCL because the rate was not only approved by the Insurance Commissioner, but also because Defendant was required by law to charge that rate. Defendant's argument differs from a claim of immunity under section 1860.1, which has been rejected by numerous courts, because it does not assert that Plaintiff's claim falls within the exclusive rate setting jurisdiction of the Insurance Commissioner. *See, e.g.*, *Rejoice! Coffee Co., LLC v. Hartford Fin. Servs. Grp., Inc.*, Case No. 20-cv-06789-EMC, 2021 WL 5879118 (N.D. Cal. Dec. 9, 2021); *Day v. GEICO Cas. Co.*, 580 F. Supp. 3d 830 (N.D. Cal. 2022); *Boobuli's LLC v. State Farm Fire & Cas. Co.*, 562 F. Supp. 3d 469 (N.D. Cal. 2021); *Drawdy v. Nationwide Ins. Co. of Am.*, No. 2:22-cv-00271-JAM-

[1] In a similar vein, the court in *Torrez v. Infinity Insurance Co.*, No. 2:22-cv-05171-SVW-JC, 2022 WL 6819848, at *3 (C.D. Cal. Oct. 11, 2022), found that the premium refund paid by an insurance company pursuant to the Insurance Commissioner's Bulletins could not have been unfair because the rebate was not required by law under *Lara*.

KJN, 2022 WL 3020050, at *2 (E.D. Cal. July 29, 2022). Rather, Defendant argues that its conduct fell within the UCL's "safe harbor" which prohibits UCL claims where another provision of law "'bar[s]' the action or clearly permit[s] the conduct." *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1036 (9th Cir. 2003).

The Court finds that Defendant's conduct was not "clearly permit[ted]" by law despite the Insurance Commissioner's approval of the rate under the same logic as to why section 1806.1 does not immunize claims premised on the application of approved rates. In assessing section 1860.1 claims, courts have distinguished between claims that challenge "approved rates and rating factors" which are authorized by the Insurance Commissioner – and would therefore fall within the exclusive jurisdiction of the Insurance Commissioner – and claims that challenge "the *application* of approved rates" – conduct which is not necessarily approved of or regulated by the Insurance Commissioner. *Rejoice! Coffee Co.*, 2021 WL 5879118, at *4 (emphasis in original). As a California court of appeal has observed, "[i]t is possible for an insurance carrier to file with the [Department of Insurance] a rate filing and class plan that [satisfies] all of the ratemaking components of the regulations, and still results in a violation of the Insurance Code *as applied*. Such a [situation] would not involve a question of rates, but rather, it could easily involve the very separate, factual question of how the components of the class plan are applied toward members of the public." *MacKay v. Superior Ct.*, 188 Cal. App. 4th 1427, 1450 (2010) (quoting *Donabedian v. Mercury Ins. Co.*, 116 Cal. App. 4th 968, 993 (2004), *as modified on denial of reh'g* (Mar. 30, 2004)), *as modified* (Oct. 20, 2010), *as modified* (Oct. 22, 2010).

Similarly here, the Plaintiff is not challenging the rate approved of by the Commissioner, but rather the Defendant's application of the rate in light of Plaintiff's reduced operations due to the COVID-19 pandemic. Because the Commissioner does not approve how insurance companies apply the rates, the application of a rate is not *per se* permitted by law. Therefore, the Defendant's conduct in charging the

applied rate does not fall within the UCL's safe harbor for conduct clearly permitted by law.

Defendant next argues that Plaintiff has failed to state a claim because the UCL does not give courts a license to review the terms of a contract for fairness or to "rewrite" a contract. *See Spiegler v. Home Depot U.S.A., Inc.*, 552 F. Supp. 2d 1036, 1046 (C.D. Cal. 2008) *aff'd sub nom. Spiegler v. Home Depot USA, Inc.*, 349 F. App'x 174 (9th Cir. 2009).[2] In *Spiegler*, the court dismissed a claim alleging that it was an unfair business practice for the defendant to charge the agreed-upon fixed price in the contract. *Id.* at 1045–46. The contract was for the installation of cabinets which set forth the price based on measurements taken by a sales professional dispatched to the plaintiffs' home. *Id.* at 1041–42. After the contract was signed and before the installation, a "measurement technician" was dispatched to the plaintiffs' home to confirm the measurements who found that less material was needed. *Id.* The plaintiffs alleged that the Defendant violated the UCL by failing to adjust the price based on the more accurate measurements. *Id.* at 1045. The court rejected this claim finding that the "UCL cannot be used to rewrite [ ] contracts or to determine whether the terms of [ ] contracts are fair." *Id.* at 1046; *see also Searle v. Wyndham Internat., Inc.*, 102 Cal. App. 4th 1327, 1334 (2002) ("[T]he 'unfairness' prong of section 17200 'does not give the courts a general license to review the fairness of contracts." (citations omitted)). However, in *Spiegler*, the court only reviewed the claim under the balancing test approach because the plaintiffs could not tether their claim to a public policy.

Here, Plaintiff similarly alleges that it was an unfair business practice for the Defendant to not adjust the contract based on the changed risk factors, despite

[2] At oral argument, Defendant contended that their argument has not been presented in the other similar pandemic insurances cases. A review of the other cases confirms that courts have not had yet had an opportunity to address this issue in this context. See, e.g., *Rejoice! Coffee Co., LLC v. Hartford Fin. Serv. Group, Inc.*, Case No. 20-cv-06789-EMC, 2021 WL 5879118 (N.D. Cal. Dec. 9, 2021); *Day v. GEICO Casualty Company*, Case No. 21-cv-02103-BLF, 2022 WL 179687 (N.D. Cal. Jan. 20, 2022); *Boobuli's LLC v. State Farm Fire & Casualty Co.*, 562 F. Supp. 3d 469 (N.D. Cal. 2021); *Drawdy v. Nationwide Ins. Co. of Am.*, No. 2:22-cv-00271-JAM-KJN, 2022 WL 3020050, at *2 (E.D. Cal. July 29, 2022).

having agreed to pay the contract price. However, this Court is not reviewing the contract for general unfairness under the balancing test as the court in *Spiegler*. Instead, the Plaintiff has tethered their claim to a public policy. Plaintiff alleges that Defendant engaged in an unfair business practice that violated the policy expressed in Proposition 103 by: (1) continuing to charge a rate that Defendant should have known produced an "excessive" rate of return in light of new circumstances and (2) by failing to conduct a reassessment of Plaintiff's exposure or notify Plaintiff about the opportunity to request a reduced premium. The Court may assess whether this conduct violated the UCL without reviewing the contract terms for fairness or rewriting the contract. Plaintiff has therefore sufficiently stated a claim under the unfairness prong of the UCL.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss as to Count Two insofar as it relates to the alleged failure to provide refunds, and otherwise DENIES the Motion to Dismiss to Dismiss as to Count Two.

B. Unjust Enrichment

Plaintiff's other claim is that Defendant was unjustly enriched. Defendant argues that this claim must fail because there is a contract that governs the rate of the premium obtained by defendant, and because Defendant's enrichment was not unjust.

There is no separate cause of action for unjust enrichment under California law; rather, unjust enrichment describes "the result of a failure to make restitution under circumstances where it is equitable to do so." *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003) (quoting *Lauriedale Assocs., Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1448 (1992)); *see also In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 967 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014). Unjust enrichment is "synonymous with restitution," and an action seeking recovery for unjust enrichment is an action for restitution. *See Dinosaur Dev., Inc. v. White*, 216 Cal. App. 3d 1310, 1314 (1989). "When a plaintiff alleges unjust enrichment, a court may 'construe the cause of

action as a quasi-contract claim seeking restitution.'" *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)).

Restitution is a quasi-contract theory, which allows for "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received," *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 174 (2000), where the benefit to the defendant was conferred through "fraud, duress, conversion, or similar conduct," *McBride v. Boughton*, 123 Cal. App. 4th 379, 388 (2004). The "mere fact that a person benefits another is not of itself sufficient to require the other to make restitution." *Dinosaur Dev.*, 216 Cal. App. 3d at 1315 (quoting *Marina Tenants Ass'n v. Deauville Marina Dev. Co.*, 181 Cal. App. 3d 122, 134 (1986)). There must be some showing of wrongdoing in obtaining the benefit, "otherwise, though there is enrichment, it is not unjust." *Nibbi Bros. v. Home Fed. Sav. & Loan Ass'n*, 205 Cal. App. 3d 1415, 1422 (1988) (quoting 1 Witkin, *Summary of Cal. Law* (9th ed. 1987) Contracts, § 97, p. 126).

Moreover, "[a]s a matter of law, a quasi-contract action for unjust enrichment does not lie where express binding agreements exist and define the parties' rights." *California Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 153 (2001); *see also Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996). Courts imply quasi-contracts for the equitable purpose of ensuring that fair payment is made for services rendered or benefits conferred. *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1388 (2012), *as modified on denial of reh'g* (Feb. 24, 2012). "However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation. . . . When parties have an actual contract covering a subject, a court cannot—not even under the guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract." *Id.* (quoting *Hedging Concepts, Inc. v. First Alliance Mortg. Co.*, 41 Cal.

App. 4th 1410, 1420 (1996)). Thus, where there is an existing express contract, a party may only bring a claim for restitution if the contract is unenforceable, procured by fraud, or otherwise inapplicable. *See Rutherford Holdings*, 223 Cal. App. 4th at 231.

At the pleading stage, a plaintiff may plead inconsistent and alternative claims. Though it is true that Plaintiff will not be able to recover on its restitution claim if there is a valid enforceable contract governing the claims, at this point "[i]t would be improper to exclude the quasi contract claim on the basis that it cannot co-exist alongside a contract remedy because the Court has yet to determine whether a contract remedy is available to Plaintiff." *Professor Brainstorm, LLC v. Aronowitz*, No. CV-0905644-RGK-SSX, 2009 WL 10675891, at *3 (C.D. Cal. Dec. 8, 2009). In both *Boobuli's* and *Rejoice! Coffee*, the Northern District of California allowed similar claims to proceed despite those plaintiffs not expressly pleading that the contract was invalid because there had not yet been a finding that a valid contract existed. *Boobuli's*, 562 F. Supp. 3d at *487; *Rejoice! Coffee Co.*, 2021 WL 5879118, at *10. Similarly, here, although Plaintiff has not expressly stated that the policy is invalid or does not govern the claims, the Court will allow Plaintiff's alternative claim to proceed at this stage. Moreover, Plaintiff has sufficiently pleaded that Defendant's conduct was unjust by pleading that the failure to adjust the rate or provide an opportunity to request an adjustment was an unfair business practice.

Accordingly, the Court DENIES Defendant's Motion to Dismiss as to Count One.

C. Primary Jurisdiction Doctrine

Defendant further requests that the Court dismiss Plaintiff's claims pursuant to the primary jurisdiction doctrine because determining a fair rate of return on insurance rates is a "'highly technical' inquiry that is uniquely within the Insurance Commissioner's expertise." (Mot. at 24.) Plaintiff contends that the primary jurisdiction doctrine is not appropriate here because Plaintiff's "challenge is to [Defendant's] application of approved rates, not to the rates themselves, and therefore will not require the Court to partake in any complex calculations that would

require the expertise of the [Department of Insurance]." (Opp'n at 23 (quoting *Blain v. Liberty Mut. Fire Ins. Co.*, No. 22-CV-0970-AJB-DEB, 2023 WL 2436003, 2023 U.S. Dist. LEXIS 40205, at *17 (S.D. Cal. Mar. 9, 2023).)

The primary jurisdiction doctrine is a "prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts[,]" *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002), when the issues presented are "within the special competence of an administrative body." *Farley Transp. Co. v. Santa Fe Trail Transp. Co,* 778 F.2d 1365, 1370 (9th Cir.1985) (quoting *United States v. W. Pac. R. Co.*, 352 U.S. 59, 63 (1956)). The doctrine "is designed to protect agencies possessing 'quasi-legislative powers' and that are 'actively involved in the administration of regulatory statutes.'" *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (quoting *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987)). There is "[n]o fixed formula" for whether to apply the doctrine, *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006), but application may be appropriate where it "will enhance court decision-making and efficiency by allowing the court to take advantage of administrative expertise" and "will help assure uniform application of regulatory laws." *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1051 (9th Cir. 2000).

Where the court determines that an issue is within the agency's primary jurisdiction, it may either "stay[ ] proceedings or dismiss[ ] the case without prejudice, so that the parties may seek an administrative ruling." *Clark*, 523 F.3d at 1114. "There is no formal transfer mechanism between the courts and the agency; rather, upon invocation of the primary jurisdiction doctrine, the parties are responsible for initiating the appropriate proceedings before the agency." *Syntek*, 307 F.3d at 782 n.3.

To the extent that Plaintiff is challenging whether the return that Defendant obtained was excessive and unfair, the Court would agree with Defendant and other courts in this district that such a determination is a highly technical inquiry that should

be left to the special competence of the Insurance Commissioner. *See Kurshan v. Safeco Ins. Co. of Am.*, No. 2:22-cv-00225-DAD-AC, 2023 WL 1070614, at *6–7 (E.D. Cal. Jan. 27, 2023); *Drawdy*, 2022 WL 3020050, at *3. However, the Court is hesitant to dismiss claims under the Primary Jurisdiction doctrine where it is unlikely that Plaintiff will be able to obtain relief from the administrative agency. "Where there is no administrative remedy available, the doctrines of exhaustion and primary jurisdiction do not apply." *Nodleman v. Aero Mexico*, 528 F. Supp. 475, 488 (C.D. Cal. 1981); *see also Arizona ex rel. Goddard v. Harkins Admin. Servs., Inc.*, No. CV-07-00703-PHX-ROS, 2011 WL 13202686, at *2 (D. Ariz. Feb. 8, 2011) (declining to dismiss pursuant to the primary jurisdiction doctrine where there was no remedy for the party to pursue with the administrative agency). In light of the decision in *Lara*, it is unclear whether the Insurance Commissioner has authority to provide relief for Plaintiff's claims, and counsel for the Defendant was unable to point to a specific mechanism that could theoretically provide Plaintiff with relief.

Moreover, as the Court has already determined that any claims based on the failure to refund or the insufficiency of the refunds are precluded, the questions left for the Court to address are whether Defendant's alleged failure to conduct a reassessment of Plaintiff's exposure, or to notify Plaintiff about the opportunity to request a reduced premium, constituted an unfair business practice or was unjust. Any inquiry into the rate of return will be incidental to the Court's primary role of interpretating state policy and its application to Defendant's conduct – a function regularly carried out by courts. *See In re Adobe Sys., Inc. Priv. Litig.*, 66 F. Supp. 3d 1197, 1226 (N.D. Cal. 2014) (discussing the various tests for determining whether a practice is unfair under the UCL).

Therefore, the Court will retain jurisdiction over Plaintiff's claims.

D. Request for Injunctive Relief

Defendant separately moves to dismiss or strike Plaintiff's claim to injunctive relief. The Court DENIES this request as moot as Plaintiff is not seeking prospective

injunctive relief. (*See* Opp'n at 25 n. 6.)

IV. Conclusion

For the above reasons, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is GRANTED in part and DENIED in part as follows:

1. Plaintiff's second claim for violation of the UCL is dismissed to the extent it is alleging Defendant failed to provide refunds or provided insufficient refunds;
2. Plaintiff's second claim for violation of the UCL is retained to the extent Plaintiff is alleging that Defendant's failure to adjust or reassess Plaintiff's rate, or provide Plaintiff with an opportunity to request a reduced premium, was an unfair business practice; and
3. Plaintiff's first claim for unjust enrichment is construed as a claim for restitution and is retained.

IT IS SO ORDERED.

Dated: **October 17, 2023**

Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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